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National Highway Traffic Safety Administration
U.S. Department of Transportation
Docket Management, Room PL-401
400 Seventh Street, S.W.
Washington, D.C. 20590

Motor Vehicle Safety; Reimbursement Prior to Recall
Notice of Proposed Rulemaking
66 FR 64078, December 11, 2001

Advocates for Highway and Auto Safety (Advocates) is pleased to comment on the National Highway Traffic Safety Administration (NHTSA) proposed regulation regarding manufacturer reimbursement to consumers for remedies undertaken prior to a recall for a safety-related defect or noncompliance with a Federal safety standard. Section 6(b) of the Transportation Recall Enhancement, Accountability and Documentation (TREAD) Act, Pub. L. 106-414 (Nov. 1, 2001) requires that a Amanufacturer=s remedy program shall include a plan for reimbursing an owner or purchaser who incurred the cost of the remedy within a reasonable time in advance of the manufacturer=s notification@ of a recall due to a defect or noncompliance (hereinafter defect or defects). 49 U.S.C. ' 30120(d), as amended. The TREAD Act authorized NHTSA to conduct rulemaking to implement the statutory requirement.

Advocates agrees with NHTSA that the agency should review manufacturers' remedy programs to ensure that the recall program provides for the reimbursement of consumers who obtained a remedy prior to a notification of a recall, and that the agency should not become involved in case-by-case determinations of reimbursement claims. Advocates also generally supports the proposal in most other respects. However, we disagree with the Abright-line@ drawn by the agency for determining what constitutes a Areasonable time@ prior to manufacturer notification of a recall within which consumers who make repairs would be eligible for reimbursement.

NHTSA proposes that vehicle owners who repair or replace a vehicle or a vehicle part before the announcement of a recall would be eligible for reimbursement under two circumstances. First, in the event that NHTSA is involved in investigating the existence of a defect (referred to as Ainfluenced@ recalls by NHTSA), vehicle owners would be eligible for reimbursement if the repair or replacement took place on or after the date on which NHTSA

opens an engineering analysis (EA) related to the defect. Second, in the event that the manufacturer identifies a defect without the involvement of the agency (referred to as Auninfluenced@ recalls by NHTSA), vehicle owners would be eligible for reimbursement only if the repair or replacement took place within one year of the date on which the manufacturer submitted notification of the existence of a defect to NHTSA. Under this proposal, consumers who paid for repair or replacement of a defective vehicle or part prior to the EA, or more than one year before the manufacturer notified NHTSA of the defect, would not be eligible for reimbursement. While these reimbursement termination dates create a convenient Abright line@ for determining who is eligible for reimbursement, it is neither fair nor equitable to consumers to impose such a short, arbitrary time limit on reimbursement eligibility.

The basic unfairness of the proposal stems from the fact that it disenfranchises consumers who experienced a defect simply because they paid for repair or replacement more than a year before either the government or the manufacturer publicly acknowledged the existence of the defect. This has the irrational result of permitting reimbursement for vehicle owners who made repairs or obtained a replacement to remedy the defect the day *after* an EA was opened by the agency, but not for those who took the same action a day *before* the EA was opened. The same arbitrary consequences apply in the case of Auninfluenced@ recalls, in which owners who paid for necessary replacement or repairs 11 months prior to a manufacturer=s notice to the agency of a defect are eligible for reimbursement, while owners in the same exact factual circumstance but paid for the same replacement or repair 13 months prior to the formal notice of defect, are not eligible for reimbursement. Advocates does not believe that these cut-off dates, which draw distinctions at a time so close in proximity to the formal acknowledgement that a defect exists, are equitable to consumers.

In addition, the extinction of reimbursement eligibility in the case of Auninfluenced@ recalls should not be linked to the date on which the manufacturer submits notice of recall to NHTSA. This linkage might allow manufacturers to "game" the system. Since the manufacturer controls the date on which the notice of recall is filed with the agency,[1] under the right circumstances the

[1]In the case of a noncomplaince with a safety standard NHTSA is proposing to Arequire the manufacturer to specify the date when it first identified the possibility that a noncompliance existed.@ 66 FR 64079. The formulation of this requirement is vague since the concept of when a noncompliance is Afirst identified@ and what the Apossibility@ of a noncompliance are not precise terms and are not defined. This affords manufacturers discretion to select as the date, when the company Afirst identified the possibility@ of a noncompliance – which could be any date between the initial indication that a specific noncompliance may exist (based on data, one or more test results, or crash investigations, etc.,) and formal acknowledgment by an official of the manufacturer of the existence of the noncompliance, an event that may not occur until a much later date. Manufacturers could specify a date within this range that is perceived as being to the

manufacturer would have an economic incentive to delay filing the recall notice. If the volume of repair and replacement claims being filed was diminishing, a manufacturer could delay the notice for a variety of technical or legal reasons until the bulk of the consumer complaints or claims were more than one year old, and eligibility for reimbursement, at least under this statutory provision, had expired. While we realize that other issues affect the timing of the filing of a defect notice, the one-year eligibility period will certainly become a factor manufacturers will consider.

Advocates believes that any vehicle owner who has had to repair or replace a defective vehicle or part prior to the announcement of an official recall should be eligible for reimbursement. Owners who have actually experienced the defect in their vehicle, and paid to repair or replace the defective part, should not be placed at a disadvantage because they chose (or were forced by necessity and/or safety concerns) to remedy the defect prior to an official acknowledgement of the defect by either NHTSA or the manufacturer. This penalizes owners who make timely repairs of safety-related equipment. While it makes sense to recall defective vehicles and parts to prevent future problems, it also makes sense to reimburse all vehicle owners who used the defective vehicle or part and suffered the economic cost of paying for a repair or replacement.[2] Thus, the most equitable plan would reimburse all vehicle owners who could provide proof that they paid for the repair of replacement of a defective part that was subsequently the subject of a recall.

The TREAD Act provision requires manufacturer reimbursement plans to include reimbursement for owners who incurred the cost of the remedy within a Areasonable time@ prior to the manufacturer=s notification. A “reasonable time,” however, need not be expressed as a specific time certain. For this purpose, NHTSA could interpret the term Areasonable time@ to commence when vehicles containing the defect were initially produced by the manufacturer. Thus, a Areasonable time@ could be defined to mean a time starting on the date that the first vehicle model containing the defect was sold to the public, and ending on the date that a recall is formally announced. However, we understand that the agency may wish to interpret Areasonable time@ as imposing a specific calendar period rather than an open-ended approach to defect reimbursement, even though the length of an EA is by no means limited to a defined time period.[3]

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advantage of the manufacturer with respect to consumer reimbursement.

[2]Indeed, without reports from vehicle owners to NHTSA and manufacturers regarding the defect they experienced, and the fact that a repair or replacement was necessary, the resultant recall might never occur.

[3]According to NHTSA, Athe goal is to complete an engineering analysis within one year.@ 66 FR 64079. The fact that there is no set time limit for an EA raises another question of equity. There will inevitably be a disparity in treatment between consumers entitled to reimbursement

In the event that NHTSA decides to apply a specific defined time period, Advocates suggests that comparable treatment should be afforded to vehicle owners whether they have already repaired the defect subject to a recall or not. Currently, manufacturers must provide a recall remedy without charge for vehicles and equipment first purchased not more than 10 years prior to the recall and, for tires, not more than five years prior to the recall. 49 U.S.C. ' 30120(g)(1), as amended by ' 4 of the TREAD Act. Advocates views this as the appropriate Areasonable time@ requirement for reimbursement under ' 6(b) of the TREAD Act.

NHTSA would have to determine a separate Areasonable time@ period for the purpose of reimbursement for child restraints which, although possibly considered items of motor vehicle equipment, are not specifically covered in ' 30120(g)(1). We would suggest that a "reasonable time" for repair or replacement of child restraints would require a one year Alook back@ provision for infant restraints, since these restraints are generally recommended for use only to one year of age or a little longer, but three or five years would be more appropriate for all other child restraints since they are intended for larger children and are used for much longer periods of time.

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Henry Jasny
General Counsel

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under Ainfluenced@ recalls compared to Auninfluenced@ recalls. For Auninfluenced@ recalls, while the date of notification can be selected by the manufacturer, the Alook back@ period of reimbursement eligibility for prior repairs is always one year. For Ainfluenced@ recalls, however, the reimbursement eligibility period could be either less than one year or more than one year depending on how long it takes to complete the EA and whether the manufacturer agrees to a recall at the conclusion of the EA.